

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 12TH APRIL 2007 / 22ND CHAITHRA 1929

SA.No. 649 of 1993()

O.S.120/88 OF MUNSIFF COURT, PALA.
AS.72/1991 of DISTRICT COURT, KOTTAYAM
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APPELLANT: APPELLANT/DEFENDANT

MADHAVAN, SON OF KUMARAN
RESIDING AT VARIYANIYIL HOUSE
KIZHATHADIYOOR KARA, LALAM VILLAGE.

BY ADV. SMT.V.P.SEEMANTHINI
B.REMANI

RESPONDENT:RESPONDENT/PLAINTIFF

LUKA, S/O.PATHROSE, KUNNATHU HOUSE
RESIDING AT KALAYATHOLIL, MARANGATTUPALLY KARA
ELAKKAD VILLAGE.

BY ADV. SRI.C.K.KOSHY
" THOMAS KOSHY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 12 /4 /2007 THE COURT ON 12/04/2007 DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A. NO.649 OF 1993

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Dated this the 12th day of April, 2007

JUDGMENT

Defendant in O.S.120/1988 on the file of Munsiff Court, Pala is the appellant. Plaintiff therein is the respondent. Suit was filed for injunction. Plaint schedule property is 47 cents in survey No.550/3 of Elackadu Village which is part of 7 acre 21 cents. Plaint schedule property admittedly originally belonged to respondent. Respondent instituted the suit contending that respondent sought a loan of Rs.1500/- and appellant agreed to lend him the money if respondent executes a sale deed as security for respondent with interest permitting respondent to retain possession of the property and to retransfer the property on repayment of the amount with interest. It was contended that as agreed Ext.B1 sale deed was executed on 9.12.1985 in favour of appellant but it was never intended to be a sale deed but only

as security and possession was also not transferred. Contending that appellant is attempting to trespass into the plaint schedule property, respondent sought a decree for prohibitory injunction. Appellant in the written statement contended that he is not a money lender but a driver in Kerala State Road Transport Corporation. But it was admitted that in November 1985 respondent sought a loan from him and believing respondent Rs.48,580/- was paid and in first week of December 1985 respondent approached appellant and offered to sell the property on condition that the property is to be reconveyed on repayment of Rs.48,580/- and thereafter on 9.12.1985 Ext.B1 sale deed was executed. It was further contended that amount borrowed was not Rs.1500/- as alleged but Rs.48,580/-. It was also contended that respondent did not repay the amount as agreed and appellant is in possession of the property and in such circumstance, respondent is not entitled to the decree for injunction sought

for.

2. Learned Munsiff framed the necessary issues. On the evidence of Pws.1 to 4 on the side of the respondent, and DW1 on the side of appellant, and Exts.A1 to A6, B1 and X1, learned Munsiff found that though Ext.A1 is a sale deed, it is clear from the evidence that it was executed only as a security with an understanding that on receipt of the amount borrowed, appellant would reconvey the property and possession continued with respondent and appellant is entitled to get the amount paid to the respondent; but he is not entitled to resist the enjoyment of the property by respondent. A decree for injunction was granted without prejudice to the right of appellant to seek appropriate remedy for due performance of the agreement for repayment of the amount due or for recovery possession of the property by due process of law. Appellant challenged the decree and judgment before District Court, Kottayam in A.S.72/1991. Learned District Judge on

reappreciation of evidence confirmed the decree and dismissed the appeal. It is challenged in this second appeal.

3. Second Appeal was admitted formulating the following substantial questions of law.

1) Whether under section 92 of Evidence Act, courts below were justified in discarding Ext.B1 while granting a decree for injunction?

2) When appellant has title to the property under Ext.B1, whether courts below were correct in granting a decree for injunction in favour of respondent?

4. Learned counsel appearing for appellant was heard. There was no representation for respondent as respondent did not engage a counsel after the original counsel expired.

5. Under Ext.B1, respondent assigned the plaint schedule property in favour of appellant on

9.12.1985. As per Ext.B1 title and possession has been transferred to appellant. But when examined as DW1, appellant himself admitted that Ext.B1 was not executed as a pucca sale deed and instead his own evidence was that it was executed as security for the amount paid to the respondent as loan. It was also admitted by appellant that he had agreed to reconvey the property as and when the amount is repaid by the respondent. In the light of this evidence, on appreciation of evidence by the courts below found that appellant did not obtain possession of the property. It cannot be found fault with. Evidence establish that eventhough Ext.B1 sale deed was executed, it was never treated as a sale deed but only as security to enable appellant to realise the amount paid to the respondent as loan. It was also clear that appellant had agreed to reconvey the property on receipt of the amount paid to the respondent. True, there was dispute with regard to the amount borrowed by respondent and paid by appellant.

When respondent contended that it was only Rs.1500/- appellant contended that it was Rs.48.580/-. Anyway the amount borrowed, is not to be decided in the present suit. The question is only regarding possession.

6. The evidence of PW1 itself establish that he did not obtain possession of the property under Ext.B1. When the sale deed was executed as security, there was no yielding trees in the property. When appellant has no case that he has cultivated the property, evidence of the respondent and his witnesses and the admission of PW1 establish that inspite of execution of Ext.B1, possession of the property continued with the respondent. In such circumstance, as rightly found by the courts below, appellant is not entitled to take possession of the property other than by due process of law and respondent is entitled to the decree for injunction granted by the courts below. The trial court itself granted liberty to appellant to seek appropriate remedy either for

realisation of the amount paid to respondent or for recovery seeking possession of the property under Ext.B1. In such circumstances, I find no reason to interfere with the concurrent findings of the courts below.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.649 /1993

JUDGMENT

12TH APRIL, 2007